No. 84-4 (8)

In THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

ROBERT L. ESTES
M. MILTON SWEENEY
STEWART, ESTES, & DONNELL
14th Floor
Third National Bank Building
Nashville, Tennessee 37219
(615) 244-6538
Counsel for Petitioners

46pp

QUESTIONS PRESENTED

1. Whether a lower court's ruling on a Judgment Notwithstanding the Verdict should be overturned by a Court of Appeals when it is obvious that the majority in the split opinion has ignored facts upon which the lower court relied and has erroneously interpreted the facts as clearly contained in the transcript and appendix presented to that court.

2. Whether or not the Sixth Circuit Court of Appeals, by two-to-one split decision (Kennedy and Keith for the majority, Wellford dissenting) has misinterpreted the *San Diego Gas & Electric Co.* v. *City of San Diego* case, 450 U.S. 621 (1981) by inferring a holding which is not contained within that decision, so that a purported temporary interference with an investor's profit expectation constitutes an unconstitutional "temporary" taking under the Fifth Amendment of the United States Constitution such that money damages should be allowed. The majority's opinion is apparently based upon an implication contained in the *San Diego Gas* case as a result of a one-line remark contained in that opinion by Justice Rehnquist.

3. Whether, as here, a regional planning commission, which has been found to have acted in good faith, granting to a developer due process, both substantive and procedural, in the enforcement of validly enacted zoning ordinances and subdivision regulations, can be found to have violated a developer's Fifth Amendment rights by a temporary interference with profit-backed expectations, especially where such rights were supposedly obtained by submitting a preliminary plat for preliminary approval which on the face of the plat itself indicates the approval is limited in scope as to the total number of dwelling units approved preliminarily on that plat, and which plat violates both the *original* zoning ordinances and subdivision regulations in effect at the time the development of the subdivision began and the later amended zoning ordinances and subdivision regulations against which the Bank is complaining.

OTHER PETITIONERS NOT LISTED IN THE CAPTION

WILLBURN H. KELLEY, JR., County Judge

MITCHEL BEARD, Planning Commission Member

ROBERT MEDAUGH, Planning Commission Member

JACK MEAGHER, Planning Commission Member

JOE BAUGH, Planning Commission Member

CAROLYN WATERS, Planning Commission Member

KENNETH MCNEIL, Planning Commission Member

CHARLES MOSLEY, Planning Commission Member

MORTON STEIN, County Planner

THAYER MARTIN, County Engineer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84–4

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, entered on March 7, 1984, is reported at 729 F. 2d 402. A copy of that opinion is reproduced in the Joint Appendix at 44 through 66. The Order and Memorandum of the District Court granting the Judgment Notwithstanding the Verdict is not reported. However, it is reproduced in the Joint Appendix at 36 through 42.

JURISDICTION

The opinion of the Court of Appeals was rendered on March 7, 1984. Thereafter, a timely petition for panel rehearing and suggestion for rehearing en banc was denied on April 20, 1984, (J.A.81). By order dated May 3, 1984, the court below stayed its mandate until July 2, 1984. Petition for certiorari was filed on July 2, 1984, within 90 days of entry of the order denying the petition for rehearing. The Petition was granted on October 1, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Williamson County Regional Planning Commission (hereinafter the "Commission") is a state regional planning commission with authority over all the unincorporated portions of Williamson County, Tennessee, which adjoins Metropolitan Nashville, Davidson County, Tennessee. The respondent, Hamilton Bank of Johnson City (hereinafter the "Bank") in November 1980 acquired ownership of a portion of the Temple Hills Development which had not yet been developed. The Bank acquired the remaining undeveloped portion as a result of foreclosing upon its borrower who was the prior developer (R. 71, 81, 88).

The Bank sued the Commission because the Commission turned down a preliminary plat submitted by the Bank in June 1981.

The Temple Hills Development was begun shortly after a new zoning ordinance was enacted by the Williamson County Commission (the County Court, not the Petitioner herein) in 1972. At that time, a developer seeking approval of a development was required to come before the Commission for the preliminary approval of what was called an "initial sketch plan". The initial sketch plan, as the title connotes, was a very limited plan in that it required very little, if any, engineering data that might ultimately be required for approval of either a final plat of either an individual section of the development, or of the development as a whole, or a building permit. The purpose of the initial sketch plan was to allow the Commission, the county planner, and the developer to review the proposed development to determine whether it *generally appeared to be in conformance with the zoning ordinances and subdivision regulations* (R. 49, J.A. 82; R. 54, J.A. 82; Def.Ex. 108, R. 417, 418). In other words, the procedure consisted of two basic steps. The first step, the preliminary plat, was a mere general diagram of the layout of the proposed development. The preliminary sketch plat did not include any engineering data by which the slope of the property or road grades could be determined and did not contain other information which would be necessary before a final plat could be approved. The preliminary sketch plat is not required to be nor was it recorded in this case. The second step required

the submission to the Commission of a final plat which would contain significant engineering data, would be authenticated by the Secretary of the Commission and would be recorded in the Register's office of Williamson County, Tennessee (Def.Ex. 108, R. 417, 418). In order to be approved by the Commission, the final plat had to conform to and be in conformance with all requirements of the Williamson County zoning ordinances and subdivision regulations (Def.Ex. 108, R. 417, 418).

The original developer of the property in question sought and obtained initial sketch plan approval from the Planning Commission on February 1, 1973 for the Temple Hills Country Club Estates (Pl.Ex. 9700, J.A.422, R. 48, 156). The original total project as represented on that preliminary sketch plan indicated that there were 676 acres in the proposed development. Of that 676 acres, 287 acres were designated for dwelling unit lots, while 129 acres were designated for *future* development. In addition, the initial preliminary sketch plan showed actual dwelling units presented in *this* sketch plan as 469, and as allowable dwelling units for future development, 267 units. In addition to those figures, the initial sketch plan upon which the respondent now claims vested rights, contained large areas designated for future development as follows:

> "THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION."

Also, Note No. 9 on the plan provided as follows:

> "PARCELS WITH NOTE 'THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION' NOT A PART OF THIS PLAT AND NOT INCLUDED IN GROSS AREAS."

This preliminary or initial sketch plan with these notes thereon was revised and reapproved in May 1973, June 1974, April 1978, and April 1979 (Pl.Ex. 9701, J.A.423, R. 223, 226). No further action was taken on the total plan encompassed in the foregoing initial sketch plans, although certain individual sections within those portions of the total plan which had received initial approval did receive final approval in 1974 and 1975 (the latter final approval of Sections I, II and III reflected on Pl.Ex. 9701, J.A.423, R. 223, 226). At no time during the

reapproval process of the initial preliminary sketch plan were the notes referred to above ever deleted or changed, and no approval was sought nor obtained for development of the areas marked for future development.

It was not until 1980 that the prior developer to the Bank first submitted a preliminary sketch plan which proposed to develop those areas that had previously been excluded from approval and so marked on all preliminary plats approved since 1973 (R. 1103, 1108, J.A. 208; Def.Ex. 103, R. 1120). Unlike the preliminary plat approved in 1973 and reapproved several times thereafter, the preliminary sketch plat first submitted by the Bank's predecessor developer in 1980 contained cul-de-sacs in excess of the allowable limits set forth in the subdivision regulations in effect in both 1973 and in later amended regulations (R. 1108, J.A. 208; Def.Ex. 111, 112, R. 1184, 1188). Further, this preliminary plat, taken together with the topographical maps that were submitted to the Commission in 1979-1980 for the first time (Pl.Ex. 9705, R. 182, 188), indicated road grades clearly in excess of that allowed by the subdivision regulations, both in 1973 and later as amended (Def.Ex. 110, 111, R. 1065, 1184, 1188).

Further, the 1980 preliminary plat, taken together with the topographical map, clearly indicated that there were approximately 88 acres within the development that approval was first being sought that lie on slopes in excess of 25% (Pl.Ex. 9705, R. 182, 188; Pl.Ex.1087, J.A.285, R. 173, 199).

Additionally, another significant change contained on the 1980 preliminary plat was the fact that the boundary lines of the development had changed in that 18½ acres of the original development had been condemned by the State of Tennessee in the development of the Natchez Trace Parkway, for which the developer was properly compensated by the State (R. 132, J.A.90; R. 262, J.A.109; R. 1106, J.A.207; R. 1108, J.A.208; R.1127, J.A.210; R. 1133, J.A.211; R. 1704-1706, J.A.222; Pl.Ex. 9705, R. 182, 188).

The 1980 preliminary sketch plat thus revealed numerous violations of both the 1973 zoning ordinances and subdivision regulations as well as those as amended from time to time thereafter (Pl.Ex. 1087, J.A.285, R. 173, 199; Def.Ex. 108, R.

417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184; Def.Ex. 110, R. 1065; Def.Ex. 111, R. 1184, 1188; Def.Ex. 112, R. 1184, 1188). For instance, the zoning ordinances in effect in 1973, which were the first to allow cluster development in the county, as well as those amended from time to time through 1981, required that all areas contained within such development that had a slope greater than 25% be deducted from the gross acreage in determining the total density of the entire development.

Up until the 1980 plat was submitted by the respondent's predecessor developer, none of the preliminary sketch plats that were submitted to the Commission, or approved by the Commission, and none of the final plats for certain limited sections of the subdivision, contained any request for approval of more than 469 dwelling units in the development. The 1980 plat was the first plat that sought approval for any number greater than that (R. 262, J.A.109; R. 1106, J.A.207; R. 1108, J.A.208; R. 1127, J.A.210; R. 1133, J.A.211; R. 1704-1706, J.A.222).

Until the 1980 plat was submitted, no plat had been submitted to the Commission asking for or obtaining approval of those areas of the development that had been marked on the original preliminary sketch plat as "THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION," and "PARCELS WITH NOTE 'THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION' NOT A PART OF THIS PLAT AND NOT INCLUDED IN GROSS AREAS."

With all the foregoing plats, information and the disapproval by the Commission of the 1980 plat being known to the respondent Bank, the Bank foreclosed on the prior developer in November 1980. Shortly thereafter in June 1981, the respondent Bank submitted a preliminary sketch plat which was essentially identical to the 1980 plat and which contained all the foregoing errors and new information and materials which had been submitted to the Commission for the first time in 1980 and disapproved (Pl.Ex. 9702, J.A.424, R. 233, 234; R. 1151-1152; R. 1180-1182).

Although the Complaint of the Bank complains that the newer amended zoning ordinances and subdivision regulations

enacted in 1977 were the reasons its plat was turned down by the Commission, both the plat that the respondent Bank submitted in June 1981, as well as the plat that its predecessor developer submitted in 1980, not only violated the newer zoning ordinances and subdivision regulations, but clearly and unequivocally violated the older 1973 zoning ordinances and subdivision regulations which were in effect at the time this development was first sought to be developed (Def.Ex. 108, R. 417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184; Def.Ex. 110, R. 1065; Def.Ex. 111, R. 1184, 1188; R. 169; Pl.Ex. 9702, J.A.424, R. 233, 234).

The Bank now takes the position that simply because the original preliminary sketch plat showed 677 acres, approval of 469 dwelling units and merely a potential for development of 736 units, it is entitled to develop 736 units. This total is based strictly upon a mathematical calculation on the density formula provided in the original zoning ordinance in 1973. This calculation does not take into consideration the portion of the property required by the ordinance to be deducted from the gross area, or the fact that a portion of the property no longer belongs to the development, i.e., that portion having been condemned by the State. The Bank also totally ignores the fact that the original preliminary sketch plan clearly states on the face of it that certain parcels were not to be developed until subsequent approval was obtained from the Planning Commission, as well as the fact that the actual number of dwelling units approved on that plat was only 469 (Pl.Ex. 9700, J.A.422, R. 48, 156).

Immediately after the initial rejection of its preliminary plat in 1981, the Bank made no genuine attempt whatsoever to correct the deficiencies pointed out to it. Instead, the Bank proceeded to insist that the plat be approved by the Commission in that form and spent most of its time, energy and resources hiring engineers to testify at trial that, because of the eight reasons given by the Commission for turning it down, it was now economically impossible to develop the plat. The Bank never attempted to present a proposal to the Planning Commission of any viable alternative which could meet any of the zoning ordinances and subdivision regulations enacted in 1973, by which

it contended this respondent must comply. The Bank simply filed suit and alleged damages from the people of Williamson County, Tennessee by alleging and arguing that the amended zoning ordinances and subdivision regulations, not the original ordinances and subdivision regulations in effect when the subdivision was begun in 1973, were the factors preventing approval of the plat it submitted in 1981. The Bank filed suit in August 1981. It was only after the trial, and in attempt to settle the question as to the estoppel issue, that the Bank made any attempt to redesign its proposed plan. When the plan was redesigned substantially in accordance with the manner in which the county engineer testified at the trial, the Commission, on March 10, 1983, approved a new preliminary sketch plan (A. to Brief).

During the trial, Thayer Martin, the county engineer, testified that he could redesign and in fact did redesign the layout of the road to show that it could be developed within the zoning ordinances and subdivision regulations in effect not only in 1973, but in effect in 1981, so that the total development could contain approximately 558 dwelling units (R. 1570, J.A.220). The opinion of the U.S. Court of Appeals for the Sixth Circuit totally disregarded this qualified expert's testimony (J.A.44–66).

Although the zoning ordinances in effect in 1973, as well as those later in effect in 1981, required a certain minimum amount of "open space" within its development (Def.Ex. 108, R. 417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184), which "open space" was to be held primarily for the use and benefit of the residents of the cluster development (Def.Ex. 108, R. 417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184; R. 341, J.A.139; R. 378, J.A.142; R. 602, J.A.153), the "open space" has been developed by prior developers of the respondent and thereafter sold to entities or individuals other than those permitted by the zoning ordinances and without approval of the Commission as required by the zoning ordinances (Def.Ex. 105, J.A.392, R. 1144, 1145; Def.Ex. 108, R. 417, 418; Def.Ex. 127, R. 1879, 1884). Both the 1973 and 1981 zoning ordinances required that the "open space" be held primarily for the benefit of the residents of the entire development; however, prior developers of the property placed restrictive covenants and amendments thereto

which were not approved by the Commission or the Homeowners' Association, effectively excluding residents of the development from using the "open space" unless and until they became members of a private country club (Def.Ex. 105, J.A.392, R. 1144, 1145; Def.Ex. 124, R. 426, 427; Def.Ex. 125, R. 1872, 1884; Def.Ex. 126, R. 1188, 1189; Def.Ex. 127, R. 1879, 1884; R. 1874-1887, J.A.225; R. 1889, J.A.236). Thus, approximately 260 acres of this development has been developed as a private country club and golf course for the benefit of the developers. Additionally, 212 dwelling units had already been approved by the Commission for the prior developers to develop before the respondent Bank foreclosed and purchased the property now in dispute and submitted its preliminary sketch plat of June 1981, upon the disapproval of which this lawsuit was filed. That portion of the property on which the 212 dwelling units were given both preliminary and final approval by the Commission, and which property has been substantially developed fully, is not a part of the property foreclosed on and purchased by the Bank and is not a part of this lawsuit.

Although the respondent Bank is alleging that it had spent large amounts of money on this development for both on-site and off-site improvements for the "total development" (R. 80, J.A.83; R. 265, J.A.110), Tom Kenny of the Harpeth Valley Water District, which served the development, who was a witness for the respondent Bank, testified on cross-examination that the same off-site improvements would have had to have been provided for a development of 400-500 homes, which the Commission has indicated it would clearly approve (R. 892, J.A.197; R. 1570, J.A.220). Furthermore, in the area now sought to be developed by the respondent Bank, there have been no on-site improvements whatsoever by either the respondent Bank or its prior developers, as all on-site improvements made on the development have been for the previous 212 dwelling units on which the Commission has given final approval as well as for the golf course and country club which have been developed and sold (R. 365).

SUMMARY OF ARGUMENT

The majority of the United States Court of Appeals for the Sixth Circuit has erroneously determined, after review on appeal, that the trial court's granting of the Judgment Notwithstanding the Verdict should be overturned because there was sufficient evidence to support a finding of a "taking". Not only did the majority for the Court of Appeals incorrectly interpret the evidence before it, it also erroneously found that the dissenting opinion from *San Diego Gas & Electric Co.* v. *City of San Diego,* 450 U.S. 621 (1981) is controlling law.

It is the position of the Petitioner that the dissent in the *San Diego Gas* case cannot be interpreted to be the law regarding unconstitutional takings under the Fifth Amendment of the U.S. Constitution. To do so requires a finding by the Court of Appeals that would overturn all prior decisions of the United States Supreme Court regarding that question. *Mugler* v. *Kansas,* 23 U.S. 623 (1887); *Pennsylvania Coal Company* v. *Mahon,* 260 U.S. 393 (1922); *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978) and *Agins* v. *City of Tiburon,* 447 U.S. 255 (1980). Even if the Supreme Court should now decide that all of these prior decisions should be overturned and the dissent set forth in the *San Diego Gas* case become law there cannot be found to have been a taking in this case even under the *San Diego Gas* rationale.

In order for there to be a taking there must first be established some right on behalf of the Complainant which is susceptible of protection under the Fifth Amendment. The preliminary plat sought to be approved by the Bank in June 1981 and upon which its entire lawsuit is based contained violations of the ordinances and regulations in effect at that time, as well as those in effect in 1973, with which the Bank, at minimum, must comply.

In the instant case the Bank which acquired a portion of an ongoing development through foreclosure has not acquired such cognizable vested rights that have been taken. At the time the Bank acquired a portion of the development, it was aware that the subdivision regulations and zoning ordinances which affected the property had been amended and upgraded and, in fact, had been applied to the development. It was also aware

that continued development, substantially as the Bank contemplated, had been disapproved by the Commission in October 1980 prior to the time it purchased the property.

The Bank also claims that it has certain vested rights as a result of action taken by the Planning Commission at the time the development was initially approved in 1973. This argument is incredulous in light of the fact that the initial approval in 1973 explicitly withheld approval of development of certain areas of the property within the subdivision. These areas that were purposely not given approval at the original time, now constitute part of the property sought to be developed by the Bank. It can have no rights under the prior approval upon which it now claims to rely for areas that were *not* approved.

Having failed to establish any cognizable rights, the Bank cannot be allowed to sustain an action for violation of rights which it does not possess.

Further, even under the doctrine set forth in the dissent of *San Diego Gas* there cannot be a finding in this case that the Bank was denied economically viable use of the property. The Court of Appeals fails to consider the fact that the development must be considered as a whole. Small portions thereof for which the Bank now seeks approval cannot be segregated out when attempting to answer the question of whether or not the Bank and its prior developers had been denied any economically viable use of the property. This Court was explicit in *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978) when it stated "taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." The developers of this subdivision, prior and the present Bank, have had 212 dwelling units and a 27 hole private golf course approved and almost totally built.

It is time for the Court to recognize the fact that the reason there is so much confusion in the area of taking and land use development is that the Court should not consider whether or not there has been a compensable taking under the Fifth Amendment, but whether there has been a violation of due process, either substantive or procedural. It is submitted that while the Court may have spoken in terms of property rights

being taken, in actuality all of the tests set forth in the cases through the years have been based upon violation of due process. *Mugler* v. *Kansas*, 123 U.S. 623 (1887) and *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922) and *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978). All of the tests set forth in those prior decisions while couched in terms of property rights really speak in terms of violation of due process. In the instant case, the verdict from the District Court was that the Bank had been afforded all due process to which it was entitled, both procedural and substantive, and that finding was not disturbed by the U.S. Court of Appeals for the Sixth Circuit. The U.S. Court of Appeals for the Sixth Circuit must be reversed, as to the taking issue.

ARGUMENT

A. THAT THE MAJORITY OF THE COURT OF APPEALS ERRONEOUSLY INTERPRETED THE EVIDENCE PRESENTED TO IT AND ERRONEOUSLY INTERPRETED THE IMPLICIT HOLDING OF THE *SAN DIEGO GAS* CASE.

In the opinion of the U.S. Court of Appeals for the Sixth Circuit, both the majority and dissenting judges agree that at the time they rendered that opinion, the Supreme Court had not set a clear standard as to what conduct amounts to a "taking" under the Fifth Amendment. The majority, by interpreting what it finds to be the implicit holding of *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621 (1981), relies upon a statement made by Justice Rehnquist in a concurring opinion, referring to the dissent in that case. Justice Renhquist's statement, "I would have little difficulty in agreeing with much of what was said in the dissenting opinion of Justice Brennan . . . ." does not necessarily provide the strong support of Justice Brennan's dissent upon which the majority of the Court of Appeals attempts to rely. Judge Wellford, in his dissent, clearly indicates that Justice Rehnquist would decide with the majority as a result of his opinion in *Loretto* v. *Teleprompter of Manhattan, CATV Corp.*, 458 U.S. 419 (1982). The majority opinion of the Court of Appeals obviously disregards substantial evidence in the case, or perhaps it failed to review certain exhibits (the various plats

submitted to the Commission from time to time) that were before the Court, that would clearly indicate that the District Judge's granting of the Judgment Notwithstanding the Verdict was entirely proper. The U.S. Court of Appeals for the Sixth Circuit supported the type of action taken by the District Court in this case in its holding in the case of *O'Neill* v. *Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). The majority ignores the District Court's narrow focusing on the issue of whether there had been a violation of the Fifth Amendment. When viewing the evidence even in the light most favorable to the Bank, it is clear that the Bank's failure to present a preliminary plat that at least met the standards in effect in 1973, prohibits the Bank as a matter of law from obtaining a judgment in its favor for a violation of the Fifth Amendment. Judge Wellford correctly views the action of the lower court's holding and states in his dissent as follows:

> Even if the jury verdict in this case did establish a temporary deprivation and a denial of economically viable use of part of the property, as apparently the District Judge concluded that it did, I would agree with his ultimate holding that "the temporary interference with the plaintiff's development backed expectations and any temporary diminution in value of the property, whether styled as 'temporary taking' or otherwise . . ." is essentially a question of law.

He concluded that under the circumstances plaintiff was not entitled to damages as a matter of law since it could proceed under 1973 zoning regulations by reason of estoppel. Judge Wellford properly views the evidence submitted to the Court of Appeals as follows:

> Properly considered, there was questionable evidence in this case, at best, that all economically viable uses of the property had been even temporarily taken, or that reasonable "investment-backed expectations" had been arbitrarily eliminated.

The majority opinion erroneously assumes that the jury's finding on the estoppel claim, which was merely that the Planning Commission was estopped to apply the amended 1979 standards, amounted to a finding that the Bank had acquired

the right to develop the Temple Hills property according to the plats that had been submitted. This was not the finding as to estoppel. The estoppel issue was whether the Planning Commission had the right to amend its ordinances and regulations and apply those amended ordinances and regulations after the development had begun.

The issue that should have been submitted by the District Court Judge to the jury, as requested by the Planning Commission in both its requests for special interrogatories and instructions to the jury, was whether the Bank had submitted a plat to the Planning Commission that complied with any ordinances or regulations, particularly those in effect in 1973. The District Court refused to submit the issue stated in that fashion to the jury, but corrected that error when it granted the Planning Commission's motion for Judgment Notwithstanding the Verdict by finding that as a matter of law the Bank had not submitted to the jury an issue of fact regarding the unlawful temporary taking under the Fifth Amendment. Thus, the District Court reached the right decision, although it is conceded it may have given the wrong reason for that decision in its Memorandum Opinion.

The majority of the Court of Appeals opinion erroneously concludes that "the District Court 'apparently concluded' as a matter of law," that without the application of the zoning regulations in a manner impermissible under state law, as evidenced by the estoppel verdict, there could not be a "taking". Actually the District Court did not find an impermissible application of zoning ordinances and regulations, but merely found that the otherwise valid 1977 amended ordinances and regulations did not themselves apply to this subdivision and that the earlier 1973 ordinances and regulations did apply. Therefore, the District Court did not find that the Planning Commission was impermissibly applying the 1977 regulations or the 1973 regulations, but merely found that they were applying the wrong regulations. Even if the Planning Commission had applied the 1973 regulations, the plat that the Bank submitted, which was disapproved and on which this lawsuit arose, did not comply with those 1973 regulations, and, therefore, the Bank presented no issue of fact triable to the jury regarding an impermissible taking under the Fifth Amendment. The fact that

the majority concludes in its opinion that the jury, which awarded the Bank $350,000 in damages, was correctly instructed on the question of damages under the theory of a temporary taking, ignores the fact that the jury's verdict was invalid because the Planning Commission was entitled to judgment as a matter of law since the Bank had never submitted a plat that was capable of approval under either the 1973 or 1977 ordinances and regulations.

It must be emphasized that June 1981 was the first time a preliminary plat was submitted by the Bank to the Planning Commission. This was the first time that numerous building sites, roads and other improvements were shown in areas that had been specifically designated in the original 1973 plat as "not part of the development" and "not to be developed until approval" was later obtained from the Planning Commission. The majority seems to be extraordinarily swayed by a letter presented at trial signed by six members of the 1973 Planning Commission stating that 736 units had been approved for that development. These members, having been persuaded by representatives of the Bank to sign that letter, ignored statements on the face of the 1973 plat that "this parcel not to be developed until approved by the Planning Commission" and "parcels with this note 'this parcel not to be developed until approved by the Planning Commission' not part of this plat and not included in gross area." Perhaps the most damning to the plaintiff's position and to the erroneous holding by the majority of all evidence contained on that plat is the statement "actual dwelling units presented this initial sketch plan, 469."

Additionally, the zoning ordinances in effect in 1973, which were the first to allow cluster development in the county, as well as those in effect in 1981, required that all areas contained within a development that had a slope greater than 25% be deducted from the gross acreage in determining the total density of the entire development. Neither the Bank not its predecessors had ever taken into account the fact that there were approximately 88 acres within this development that lie on a slope in excess of 25% (Pl. Ex. 1087, J.A.285, R. 173, 199; Pl.Ex. 9705, R. 182, 188). Thayer Martin, the county engineer, testified that in fact there were areas contained within the development now sought to be developed by the Bank that had slopes in

excess of 25% (R. 1386, J.A.219). This testimony was confirmed by experts provided by the respondent Bank, Messrs. Sid Smith and Leon Stanford (R. 656-658, J.A.156; R. 1009, J.A.201). This information was first available to the Commission in late 1979 or early 1980 when the prior developer submitted to the Commission a topographical map which contained two-foot contours allowing the determination of slope (R. 132, J.A.90; R. 1386, J.A.219; Pl.Ex.9705, R. 182, 188; Def.Ex.273, R. 1409, 1425).

The Bank's own expert witnesses, Messrs. Leon Stanford and Sid Smith, both agreed that Mr. Martin's method of calculating slope was in fact correct (R. 656-658, J.A.156; R. 1009, J.A.201). Additionally, the Bank's witness, Ms. Gail Moyer, who was on the Board of Zoning Appeals for Williamson County, also testified that if there was land within the Temple Hills Development that had slope in excess of 25%, such land should have been excluded from the development and any ruling of the Board of Zoning Appeals to the contrary was in fact incorrect (R.742-746, J.A.176; Pl.Ex.2524, J.A.310, R. 179, 199).

Unlike the preliminary sketch plat approved in 1973 and reapproved a few times thereafter, the preliminary sketch plat submitted by the prior developer in 1980 and by the respondent Bank in June 1981 contained cul-de-sacs in excess of the allowable limits set forth in the subdivision regulations in effect in both 1973 and in 1981 (Pl.Ex.9702, J.A.424, R. 233, 234; Def.Ex.111, 112, R. 1184, 1188). A viewing of these preliminary plats (Pl.Ex.9700, J.A.422, R. 48, 156; Pl.Ex.9702, J.A.424, R. 233, 234) indicates even to the untrained eye a definite change in the layout of the road system. This was the *first* time such cul-de-sacs of such great length had been presented by the Bank to the Planning Commission for approval. Further, the first time any plat with such cul-de-sacs had ever been submitted to the Planning Commission was in late 1980 by the prior developer, which plat had also been disapproved, and such disapproval was known to the respondent Bank prior to its foreclosure and purchase of the property (R.1108, J.A.208; R. 1125, J.A.209; Def.Ex.66, J.A.237, R. 1068; Def.Ex.103, R. 1120). In reviewing the preliminary plats submitted by the Bank (Pl.Ex.9702, J.A.424, R. 233, 234), together with the topographical maps that were submitted to the Planning Commission by the predecessor of the Bank (Pl.Ex.9705, R. 182, 188), it is clear that the road grade in many areas sought to be developed by the Bank would be in excess of that allowed by the 1973 subdivision regulations, which the Bank claimed are applicable to their plat, as well as in excess of that allowed by the 1981 regulations (Def.Ex.110, R. 1065; Def.Ex.111, R. 1184, 1188).

During the trial, Thayer Martin, the county engineer, testified that he could redesign and in fact did redesign the layout of the road in certain areas sought to be developed by the Bank to show that it could be developed within the zoning ordinances and subdivision regulations in effect in the county both in 1973 and 1981 so that the total development could contain approximately 558 dwelling units (R. 1570, J.A.220). The majority opinion of the U.S. Court of Appeals for the Sixth Circuit totally disregarded the testimony of Mr. Martin, a qualified expert, preferring instead purported expert testimony provided by a property *appraiser,* who testified on behalf of the Bank. This appraiser's testimony was obviously based on questionable information provided to him by Tom Ragsdale, the planner who worked for the Bank in regard to this development (Pl.Ex.9850, J.A.374, R. 671).

Both the preliminary sketch plats submitted by the Bank in 1981 as well as the plat submitted by the Bank's predecessor developer in 1980, both of which were disapproved, showed that certain land in the proposed area yet to be developed had slope in excess of 25%. A significant portion of such property had been sold to a third party and was at that time being used as a golf course. The zoning ordinances in effect in 1973 as well as in 1980-1981 all required that this land be included in "open space" and set aside within the development for the exclusive use of the homeowners therein (Def.Ex.108, R. 417, 418; Def.Ex.109, J.A.415, R. 1182, 1184; R. 1173, J.A.216). The ordinances in effect at all times pertinent hereto required that all such land not only be included in "open space", but that it be declared non-buildable land (Def.Ex.108, R. 417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184).

The Bank and its predecessors have charged that the Planning Commission "changed the rules in the middle of the

game" (Complaint, J.A.5). The only change of significance which adversely affected the development of the Temple Hills property was the change that the Bank itself tried to effect by means of its 1981 preliminary plat, which differs greatly from the 1973 plat, both in terms of those areas specifically designated as originally approved as well as those areas specifically designated as not being approved in 1973 and in reapprovals of that 1973 original sketch plat (Pl.Ex.9700, J.A.422, R. 48, 156; Pl.Ex.9702, J.A.424, R. 233, 234). Since the evidence was clear that the plat submitted in 1981 by the Bank could not even comply with the zoning ordinances and subdivision regulations in effect in 1973 under which the Bank sought approval, then it is not the Planning Commission that "changed the rules in the middle of the game", but the Bank, as a new developer, which itself changed its preliminary plat in the middle of the game (Pl.Ex.9700, J.A.422, R. 48, 156; Pl.Ex.9702, J.A.424, R. 233, 234).

Perhaps the most significant fact overlooked by the U.S. Court of Appeals for the Sixth Circuit and totally ignored by the Bank is that the entire development, not just the portion foreclosed by the Bank for which approval is now sought for development, must be considered in applying an economically viable use standard. The development had approximately 212 dwelling units approved and partially if not almost totally completed prior to the Bank's foreclosure and purchase of this property and submittal of its plat in June 1981 for approval, the golf course approved, built and in place, and the Bank under its interpretation would be allowed at least an additional 67 dwelling units, for a total of 289 dwelling units in addition to the golf course. If the Bank had revised its June 1981 preliminary sketch plat, it would have been able to obtain approval of an additional 346 units by merely correcting the road layout, removing certain areas from the development which contained areas of slope in excess of 25% and eliminating excessive road grades (R.1570, J.A.220). However, the Bank chose not to do so until after the trial of this matter.

It is submitted that the majority writing the opinion for the U.S. Court of Appeals for the Sixth Circuit so erroneously interpreted the evidence that it failed to meet the threshold standard of determining whether there were any rights that the plaintiff

acquired by submitting a plat in 1981 that did not comply with any regulations. Such a plat could not possibly create rights capable of violation, and thus capable of constituting an unconstitutional "taking".

B. THAT THE CONTRARY DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE PRIOR RULINGS OF THIS COURT AND NUMEROUS OTHER COURTS OF APPEALS, SO THAT IT IS NOW UNCLEAR AS TO THE RIGHTS OF DEVELOPERS REGARDING THE FUNCTION OF REGIONAL PLANNING COMMISSIONS ACROSS THE COUNTRY. THIS UNCERTAINTY IN THE LAW HAS THE POTENTIAL OF SUBJECTING REGIONAL PLANNING COMMISSIONS TO BILLIONS OF DOLLARS IN DAMAGES HERETOFORE NOT THOUGHT TO BE AVAILABLE TO DEVELOPERS AS A RESULT OF THE LEGITIMATE EXERCISE OF AUTHORITY BY SUCH PLANNING COMMISSIONS. TO ALLOW THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT TO STAND IN THIS CASE WILL HAVE SUCH AN ABSOLUTE CHILLING EFFECT UPON PLANNING AS TO MAKE ORDERLY AND NECESSARY PLANNING OF COMMUNITIES TOTALLY CHAOTIC TO THE EXTENT THAT THERE MAY BE NO MORE CONTROL FOR ORDERLY GROWTH, OR PROTECTION OF THE PROPERTY RIGHTS OF THE CITIZENS WHO HAVE RELIED UPON VALID ZONING ORDINANCES AND SUBDIVISION REGULATIONS AND THEIR VIGOROUS ENFORCEMENT. . . . . .

C. THAT THE ISSUE OF DAMAGES APPROPRIATE IN A FIFTH AMENDMENT TAKING HAS NEVER BEEN RULED UPON BY THIS COURT, ALTHOUGH IN SEVERAL PRIOR DECISIONS THIS COURT HAS EARNESTLY EXPRESSED A DESIRE TO RESOLVE THE QUESTION. . . . . .

The issues presented above will be argued together because they are so closely related in law and fact. A unified discussion will avoid unnecessary repetition.

Although the United States Supreme Court has never explicitly held that subdivision regulations and zoning ordinances which deprive an owner of reasonable beneficial use of his property constitute a "taking" of that property under the U.S. Constitution, other courts have found that restrictions may constitute a "temporary taking" of property if the restriction precludes all reasonable use, or if the restriction has "gone too far" or if it is unduly oppressive. The remedy in each case has been to invalidate the ordinance or regulation, not impose damages. This is, of course, not to imply that in this case there has been any deprivation of any rights of the Bank cognizable under the Fifth or Fourteenth Amendments of the Constitution, or under 42 U.S.C. § 1983.

It is asserted that the decision in *Agins* v. *City of Tiburon*, 598 P.2d 25 (1979), affirmed at 447 U.S. 255 (1980), is a case very close in point to the factual situation now before this Court. In the *Agins* case there had not been submitted a plan for development of the property, just as there had not been a plan submitted to develop the property subject to this lawsuit prior to 1980-1981. The Bank in this case had not, prior to filing suit and trial, presented a plan for development of the property that was in compliance with either the zoning ordinances or subdivision regulations in effect in 1981 when it submitted its first preliminary plan, or those in effect in 1973 upon which it claims certain rights. In the *Agins* case, the Supreme Court refers to this issue in Footnote 9 as follows:

> . . . even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered a taking in the constitutional sense. *Danforth* v. *United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed 240 (1939).

In all prior decisions, such as *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), where the Court found that a regulation might amount to a "taking", the remedy afforded to the complaining party was invalidation of the regulation, rather

than any award of compensatory damages or mandate of formal condemnation of the property. There is no authority whatsoever to find that there was a "taking" where, as in this case, the property owner cannot establish any rights under any earlier ordinances or regulations, and such ordinances and regulations have not been changed so as to affect the development of the property. If the property sought to be developed by the Bank could not be developed under the regulations in effect either in 1980 or in 1973, then there cannot be found to be a "taking" under any constitutional theory and no damages should be afforded to this respondent. The facts are simply that the topography of the land left for development after the condemnation of 18.5 acres and the development of the golf course, as well as the development of other developable land, prevents the addition of the number of building sites the Bank desired. The District Court and jury found that the Bank received all prerequisite due process, both substantive and procedural. This finding was not overturned by the U.S. Court of Appeals for the Sixth Circuit in its decision. Further, the District Court had found the zoning ordinances and subdivision regulations as applied by the Planning Commission to the plats submitted by the Bank in 1981 were *rationally applied*, and, again, this decision was not overturned by the U.S. Court of Appeals for the Sixth Circuit.

It is elementary to state that there can be no taking unless there is some right in existence which a person or entity is deprived of and which is entitled to protection. This supposed right must be in existence and must be diminished or destroyed in order for any cause of action to arise. Without approval of a final plat of the property which the Bank seeks to develop, no right could be acquired by the Bank, and, therefore, no right is violated. *Goldblatt* v. *Town of Hempstead, New York*, 369 U.S. 590 (1962); *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); and *Gorieb* v. *Fox*, 274 U.S. 603 (1927).

The majority opinion of the U.S. Court of Appeals for the Sixth Circuit erroneously finds that there was no remaining economically viable use of the Bank's property, based solely on the expert testimony of Mr. Hunt, who is an *appraiser* and not an engineer. It is clear that his testimony was based strictly

upon the interpretations of the Planning Commission's actions supplied to him by Mr. Ragsdale, the Bank's employee. The majority opinion of the U.S. Court of Appeals obviously ignores significant and contradictory evidence contained in the transcript, as well as competent engineering data offered by both the experts for the Planning Commission and the experts for the Bank, in finding that there was "no covincing evidence offered to contradict" Mr. Hunt's testimony. The majority also ignores the testimony of Morton Stein, the county planner, who is equally qualified as an expert in the area of planning. It was clear from his and Mr. Martin's testimony at trial, that approximately 558 building units in addition to the 27-hole private golf course could be located on the property for the total development. The Court also apparently ignored eight specific objections raised by the Planning Commission in rejecting the preliminary plat submitted by the Bank in June 1981 (R. 1570, J.A.220).

The majority, although ignoring this testimony for reasons unknown to this writer, concedes that if there could be 336 additional units built on the property, then the development certainly would retain economically viable use (Footnote 5, p. 8, Majority Opinion, the U.S. Court of Appeals for the Sixth Circuit, J.A.52). The majority also seems to ignore the fact that the Bank, relying upon the prior developer's rights, tends to exclude the fact that the property as a whole certainly contains some economically viable use in that at the time of trial there were approximately 212 approved building units in that development, most if not practically all of which were already constructed and sold, plus a large 27-hole private golf course in full operation. Judge Wellford, U.S. Court of Appeals for the Sixth Circuit, in his well-reasoned dissent, after apparently examining the evidence ignored by the majority, finds "Examination of the record before us, however, indicates that there was virtually conceded that even by applying 1979 standards, a total of 548 would be approved on the property." This figure, 548 units, less the 212 already finally platted and approved, equal the 336 additional building sites conceded by the majority to constitute economically viable use.

Further, as Judge Wellford indicates, "the cases cited by the majority do not, in my view, support the result which they

reach" (dissenting opinion, p. 19), and in particular, Judge Wellford, at p. 20 of the Court of Appeals opinion, cites the recent holding by the U.S. Court of Appeals for the FifthCircuit *Hernandez* v. *City of Lafayette*, 643 F.2d 1188 (5th Cir.1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd. after remand*, 699 F.2d 734 (1983).

The U.S. Court of Appeals for the Sixth Circuit has, for reasons unknown, ignored substantial portions of the transcript presented to it, and obviously had not viewed the preliminary plats submitted into evidence (Pl.Ex.9701, J.A.423, R. 223, 226; Pl.Ex.9702, J.A.424, R. 233, 234), which indicate the changes that were made after the original preliminary plat was submitted in 1973. The majority of the Court should have treated the Temple Hills Development as a single entity in determining whether the standard of economical viable use had been violated. The court in *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), was explicit that:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. 438 U.S. at 130-131.

In the present case, the entire Temple Hills Development was under one ownership at the time the development received preliminary sketch approval in 1973. When the developer defaulted, the Bank foreclosed on the undeveloped portion of the property. At that time, the golf course had been built and was operating, and 212 units had been finally approved and platted, many of which had in fact been constructed. There was substantial economic use permitted by the Commission.

There is no just reason why the Bank should stand in any better position than the previous owner as far as the taking issue is concerned. When the Bank purchased the property, it knew the Commission had disapproved a plat very similar to the one the Bank later submitted to the Commission. (R. 857, J.A.190). The Bank also knew the Planning Commission had

since 1979 been applying the amended and more restrictive regulations. The Bank had no reasonable expectation that it would be permitted to do what the prior developer could not do. The fact that the Bank may lose money as a lender to the developer of the subdivision certainly does not constitute a "taking" under any judicial application.

It is submitted, however, that for reasons other than those pertinent to this matter, the Court ought to consider a final definition of what constitutes a "taking" and appropriate damages should such occur. It is necessary that this Court define a "taking" for constitutional purposes as may relate to land use planning. In order to properly determine a definitional standard for a constitutional taking, it will be necessary to examine the history of the Fifth and Fourteenth Amendments as applied to the particular facts surrounding purported takings in land use planning cases, and compare those cases to the facts of the instant case. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

Within that short provision, the clause requiring due process of law is joined injunctively with the clause prohibiting the taking of private property for public use without just compensation. While the courts have walked a very tight rope for a number of years in trying to distinguish the due process provision from the taking provision, it is suggested that perhaps there really is no proper distinction between the two. There certainly can be no question that individual purposes or individual desires, for whatever reasons motivated, must yield in appropriate situations to the public need.

In this case, both the District Court, in its granting the Planning Commission's Motion for Judgment Notwithstanding the Verdict and for a Directed Verdict on certain issues, and the jury found that the Bank received all necessary and prerequisite due process, both substantive and procedural. No challenge has been made to the constitutionality of the zoning ordinances and subdivision regulations, even as amended from time to time. Further, the Court found that the zoning ordinances and subdivision regulations applied by the Planning Commission to the plats submitted by the Bank were rationally applied. The question before the U.S. Court of Appeals was merely, "Was there 'a taking' in the constitutional sense?" The important question is whether the action or inaction at issue constitutes "a taking" in the constitutional sense. There can be no "taking" until there exists some right as to which a person is entitled to protection. In this case, the Bank had no rights in the 1973 approval of its predecessor's preliminary plat which had been adversely affected or taken in a constitutional sense, either because of violation of due process or otherwise. The Bank's 1981 preliminary plat never received any approval, and therefore the Bank could acquire no rights in the property which could be violated. There had been no change in the zoning ordinances and subdivision regulations that affected the property after the Bank acquired the property and submitted the plat for approval.

Before considering a remedy, the Court must first decide what violation of the Plaintiff's rights, if any, was caused by the change in zoning ordinances or subdivision regulations, or by the simple disapproval of a preliminary plat in accordance with those subdivision regulations. Before a court can grant compensation, or declare zoning ordinances and subdivision regulations invalid, it must determine the basis for that relief. Before a remedy for a "taking" is fashioned, the standard for determining whether a "taking" has occurred must be established. A remedy based on a mistaken standard is no remedy at all, but merely a violation of the Petitioner-Defendant's rights.

Justice Brennan's dissenting opinion in *San Diego Gas* appears, from the language contained therein, to be a sharp departure from his opinion in *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978). It is interesting to note that Justice Brennan apparently relies upon Justice Holmes' "test" set forth in the *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922) decision, commonly known as the "too far" test. Building the test for a "taking" on the basis of the decision in *Mahon* is akin to building one's castle on quicksand. The decision also seems to be in accord with the earliest case in this line, *Mugler* v. *Kansas,* 123 U.S. 623 (1887), which held that no exercise of police power could constitute a "taking". It is also interesting to note that the dissent by Justice Brennan in the *San Diego Gas*

case cites for support cases supposedly supporting *Mugler* rather than *Mahon*, such as *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *Goldblatt* v. *Town of Hempstead, N.Y.*, 369 U.S. 590 (1962), all of which were cited with approval by Justice Brennan in his *Penn Central* decision. Although the dissent seems to reject *Mugler* and the *San Diego Gas* case and not *Mahon*, the problem, it is suggested, is that the "too far test" set forth by Justice Holmes is really no different than the test in *Mugler*, which is a substantive due process test. It is also interesting to note that if we follow the *Mahon* "too far test", then the remedy set forth in that case is to invalidate the statute and not consider whether there would be a compensable taking. To follow Justice Brennan's dissent in *San Diego Gas* would adopt the *Mahon* test for a "taking", but would reject the remedy set forth therein.

In deciding the *Agins* v. *City of Tiburon* case, Justice Brennan states that the California Court set out a *due process* test for the validation of land use regulations, 447 U.S. 255, 263, Note 9, (1980). If so, *Mahon* must also adopt a due process test. Thus the Supreme Court held in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95, that the same "too far test" was equivalent to the "unduly oppressive test".

Inverse condemnation and eminent domain theories require, according to Justice Brennan, that a "taking" occur. A "taking" connotes a transfer. In order for a "taking" to occur, some governmental entity must take some action to affect the private owner's "property" rights. For these purposes, and according to the "taking test", there must be a transfer such that the owner of the property loses certain property rights and the governmental entity receives a corresponding right. The "effect" of regulation of the type at issue is not the transfer of any property right. Therefore, there cannot be a "taking."

The appropriate consideration in this case is whether the Bank has been denied substantive due process, and not whether there have been any property rights taken. If there has been a violation of any due process as a result of the Planning Commission's determination that the preliminary plat submitted in 1981 failed to comply with either the zoning ordinances or subdivision regulations in effect as amended in 1981, then

invalidation of those regulations would be the remedy. However, it is clear from the facts of this case that there can be no invalidation of the earlier 1973 zoning ordinances and subdivision regulations with which the Bank's plat submitted in 1981 cannot comply, because its predecessors in interest initially sought and obtained approval of other portions of this development under those 1973 ordinances. Further, the District Court and the jury have found that the Bank and its predecessors have been afforded all requisite due process, both procedural and substantive. This being the case, there is no basis for invalidation of either the 1973 or amended regulations, nor can there be any damages available to the Bank under the provisions of 42 U.S.C. § 1983.

Even assuming that the "taking" issue could be considered separate and apart from due process considerations, one would then have to find that the Bank had some prior right in the development at Temple Hills which was adversely affected in order for the upgrading of the subdivision regulations and zoning ordinances in 1977 to constitute a "taking". It is submitted that the upgrading or the amending of those ordinances and regulations by the County Commission (which is not a party to this suit), or by the Planning Commission, does not give rise to any action on behalf of the Bank. There can be no "taking" if there have been no rights established.

The earliest case regarding a "taking" was *Mugler* v. *Kansas*, 123 U.S. 623 (1887) which is really a due process case. The Supreme Court held that even though a statute which prohibited manufacture of intoxicating liquors rendered a brewery *worthless*, such legislation did not constitute a "taking" of property that required compensation because the legislation was for the protection of the health, safety and morals of the community. In the instant case, the Planning Commission is specifically charged, as part of its sworn duties to protect the health, safety and morals of the community which it serves. The validity and constitutionality of the zoning ordinances and subdivision regulations in the present case were acknowledged by the District Court, which found all such regulations and ordinances to be enacted for the health, safety and welfare of the public. The District Court also found that such ordinances and regulation had

been rationally applied and that all actions of the Commission were taken pursuant thereto. The Bank has never raised the issue of whether the subdivision regulations and zoning ordinances were unconstitutionally enacted.

The premises set forth in the *Mugler* decision have continued to be valid, and were re-emphasized in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). The courts have always recognized a continuing need, as growth and urban expansion continue, for the upgrading of zoning ordinances and subdivision regulations. This includes upgrading which would restrict or interfere to some degree with the property owner's right of development. The Supreme Court has recognized the constitutionality of zoning ordinances as a valid exercise of police power, even though the effect of such ordinances may be to substantially reduce the value of the land by restricting uses for which it might ultimately be used. In *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court found zoning ordinances to be constitutional even though the value of the property may have been reduced by as much as 75%.

In continuing to uphold the constitutionality of zoning ordinances, the Supreme Court in *Gorieb* v. *Fox*, 247 U.S. 603 (1927), indicated that developmental regulations should not and would not be overturned by the courts unless there was a clear showing that such regulations were arbitrary and unreasonable and bore no substantial relationship to the public's health, safety, morals or general welfare. In the present case, the District Court has found the zoning ordinances and subdivision regulations were enacted for the public's safety, health, morals and general welfare, and were rationally applied to the Temple Hills Development, and the U.S. Court of Appeals for the Sixth Circuit did not disturb those findings. The only change in zoning ordinances that affected the Temple Hills Development was a change enacted by the County Commission, not the Planning Commission, in 1977, at a time when there was not an approved plat in effect for the Temple Hills Development. This change required 10% of the gross acreage to be deducted for roads when computing density, and that an acre be computed as 43,560 sq. ft. as opposed to 40,000 sq. ft. The application of this change would at most be only an 18% reduction of the number of dwelling units that could be placed upon the development. Even given this reduction, the total number that could still be developed on the property exceeds the original number approved in 1973, that being 469 units. Whether the area for roads should have been considered in computing for density in 1973 is questionable. However, the density calculation was not a consideration at that time because of the large area not approved for development, but specifically reserved on a preliminary plat for approval at a later time. The Bank complains of the application of the upgraded zoning ordinances to its request for approval of a preliminary plat, but in doing so it ignores the fact that there was a gap in the approval of previous plats for the Temple Hills Development upon which the Bank now tries to tack its rights. The preliminary plat approved on June 19, 1975 expired on June 19, 1976 (Pl.Ex. 9701, J.A.423, R. 223, 226; Def.Ex. 84, R. 1083, 1084). This was in accordance with subdivision regulations of Williamson County, Article II, B-7 (Def.Ex. 110, R. 1065; Def.Ex.111, R. 1184, 1188). The preliminary plat was again submitted to the Planning Commission in April 1978 for reapproval after the zoning ordinances had changed. The plat, having previously expired, had to then be approved under the new zoning ordinances then in effect. The Planning Commission did not have the authority to waive or vary the zoning ordinances. The Bank could have acquired no greater right than the approval given to the preliminary plat in 1978 under the new 1977 zoning ordinances.

In the present case, the District Court, as a matter of law, properly entered Judgment Notwithstanding the Verdict on the "taking" issue. It is clear that the Bank was aware of the zoning ordinances and subdivision regulations in effect in 1973, as well as those in effect in 1980 when it purchased the property. It was also aware that at the time it purchased the property a prior developer had submitted an almost identical plan it proposed to submit, which had been rejected by the Planning Commission. Further, the Bank was aware that in 1979 the Planning Commission enacted an amendment to its subdivision regulations that required all the current regulations and zoning ordinances to be applied to all preliminary plats being renewed after the initial approval period had expired. The Bank was also aware when it acquired property ownership in 1980 that a preliminary plat had been approved in 1979 sub-

ject to the then current regulations. There can be no "taking" or other action akin to "inverse condemnation" where the developer or owner, the Bank in this case, had prior knowledge of the conditions of which it complains. *City of Walnut Creek* v. *Leadership Housing System, Inc.,* 73 Cal. App. 3d 611, 140 Cal. Rptr. 690 (1977).

The Bank has asserted that it has been deprived of any economically viable use of its property. It is important to note that at the time of the action involved in this case neither the U.S. Supreme Court, nor any court affecting the parties, had ever explicitly held that regulations which deprive an owner of a reasonable beneficial use of his property constitute a "taking" of that property. Neither has the Supreme Court, or any other court of pertinent jurisidiction to this matter, found that oppressive regulations give rise to an action for inverse condemnation. The applicable decisions only hold that where restrictions go "too far", the regulations which place such restrictions on the property should be invalidated.

The petitioners suggest that the case of *Agins* v. *City of Tiburon,* 447 U.S. 255 (1980) is very close in point to the factual situation in the present case. In fact, the *Agins* decision ought to be determinative of this matter. In the *Agins* case no plan had been submitted for the development of the property. The same situation existed in this case in 1981. The plaintiff had not presented a plan for development that was in compliance with either the zoning ordinances and subdivision regulations in effect in 1981, or those in effect in 1973, under which it seeks review. It is of special importance to note the language contained in the *Agins* decision at page 262. The court found that the ordinances involved in that case might limit the development, but the ordinances did not prevent the use of appellant's land. Nor did such ordinances extinguish any fundamental attributable right of ownership. As in that case, the jury in this case and the court have allowed plaintiff to proceed under the zoning ordinances and subdivision regulations previously in effect. Footnote 9, at p. 263 of the *Agins* decision, should be determinative of the issues in this case, and should be sufficient to support the District Court's granting of the Judgment Notwithstanding the Verdict, and to reverse the U.S. Court of Appeals

for the Sixth Circuit's majority opinion. That Footnote reads as follows:

> The appellants also claim that the city's precondemnation activities constitute a taking. See Notes, 1, 3, and 5, *supra.* The State Supreme Court correctly rejected a contention that the municipality's good faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellant's enjoyment of their property as to constitute a taking. See also *City of Walnut Creek v. Leadership Housing System, Inc.,* 73 Cal. App. 3d 611, 620-624, 140 Cal. Rpt. 690, 695-697 (1977). Even if the appellant's ability to sell their property was limited during the pendency of the condemnation proceedings, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership." They cannot be considered a "taking" in the constitutional sense. *Danforth* v. *United States,* 308 U.S. 271 (1939).

By allowing the Bank to proceed under the 1973 zoning ordinances, the Bank will be able to develop the property under the old regulations, which will allow more units to be built upon the property with a drastic decrease in developmental cost. The only reason the Bank disagreed with the District Court's decision is that it could not, or it refuses to try to, comply with even the 1973 regulations under the preliminary plat it submitted in 1981.

After appeal was filed in the U.S. Court of Appeals for the Sixth Circuit, a cross-appeal was also filed on behalf of the Planning Commission, contesting the District Court's ruling that the 1973 regulations as opposed to those in effect in 1981 should be applied to the property. At that time, through negotiations with the Planning Commission's county planner and the county attorney, the Bank did reach an agreement and submit an additional preliminary plat with many modifications from that submitted in June 1981 to the Planning Commission for approval. This plat was in fact approved by the Planning Com-

mission, and allowed the Bank to construct 476 additional dwelling units on its property (A. to Brief). This approval of the preliminary plat should make the issue before this Court moot. It is obvious that the Bank's property contained substantial economically viable use since it has obtained approval of a preliminary plat. It should also be noted that this was the first time the Bank had ever requested variances of subdivision regulations and zoning ordinances in order to have a plat approved. If the Bank had proceeded to request these variances in 1981 and pursued its administrative remedies or state remedies at that time, the matter need not have gone into litigation.

It is suggested that there is no authority whatsoever to find a "taking" where, as in this case, the property owner cannot establish its rights under earlier ordinances or regulations. If the property could not be developed under either the 1973 ordinances and regulations because of the topography of the land that was left after the initial construction phase of the 212 dwelling units that were given final approval by the Commission, development of the golf course and the condemnation of 18.5 acres, none of those matters were within the control of the Planning Commission. If the original acreage was in fact contained within the development and it was flat, there would be no controversy here. However, the Bank readily admits that its predecessors used most of the flat land in the Temple Hills Development for the construction of the golf course and other common improvements. The Bank's inability to develop the property as it desired is the result of the natural characteristics of the property which it purchased, as well as the activities of prior developers who chose to use the best land within the project for purposes other than building units. Any changes that have occurred in the zoning ordinances and subdivision regulations as applied to the property by the Planning Commission were minor and do not constitute any type of action that severely affected the property, as in the *San Diego Gas* case or other cases relied upon by the Bank. The Bank's appeal to the U.S. Court of Appeals for the Sixth Circuit seemed to even assert that the application of the 1973 zoning ordinances and subdivision regulations, which at the trial level it had sought to have applied to the development, would constitute a violation of its Fifth Amendment rights. This argument must be perceived

as totally incredible in light of the fact that the Bank's predecessor specifically sought the enactment of those zoning ordinances and subdivision regulations so that the property could be developed pursuant thereto. It is questionable in this case whether the Bank had any property right that has been affected at all by the action of the Planning Commission. It may be unfortunate that the Bank made an error of judgment in buying property that was too rugged and steep to be developed in the same manner with the same number of building units that could be placed legitimately upon flat land. However, the Bank's error or mistake certainly cannot be chargeable to the Planning Commission or the people of Williamson County, and certainly does not rise to the level of any constitutionally protected right. If the Bank made an error in its judgment in determining the economic feasibility of developing the property, knowing full well all the ordinances and subdivision regulations that were applicable to the property, the net cost of the error of the Bank can receive no constitutional protection given the facts of this case.

It is obvious that the judge at the District Court level, after reviewing all the facts, determined that there was not sufficient evidence to submit to the jury the issue of whether or not there had been a violation of the just compensation clause of the Fifth Amendment of the United States Constitution. The District Court therefore ruled as a matter of law that there was insufficient evidence presented to raise a material issue of fact as to whether or not there had been a "taking". The Bank's failure to submit a plat to the Planning Commission prior to the time it filed suit, which complied at a minimum with standards in effect in 1973, prohibits the Bank as a matter of law from obtaining judgment in its favor for violation of the Fifth Amendment.

It is equally as obvious that the majority writing for the U.S. Court of Appeals for the Sixth Circuit ignored the fact that the Bank had failed to establish any rights that had been violated as a result of the Planning Commission's action by its failure to submit a plat that complied with the earlier regulations. The majority, ignoring much evidence to the contrary, seemed to rely particularly upon the testimony of the expert for the Bank. It is asserted that the majority's reliance upon that testimony is

misplaced. In fact, they overlooked the basic considerations that must be addressed before looking to whether there has been any denial of economically viable use.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the District Court's Judgment Notwithstanding the Verdict should be reinstated.

Respectfully submitted,

ROBERT L. ESTES
M. MILTON SWEENEY*
STEWART, ESTES, & DONNELL
14th Floor
Third National Bank Building
Nashville, Tennessee 37219
(615) 244-6538

Counsel for Petitioners

*Counsel of Record

No. 84-4

In THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO BRIEF FOR THE PETITIONERS

AGREEMENT

WHEREAS, there is now pending in the United States Circuit Court in Cincinnati, Ohio, an action between the Williamson County Regional Planning Commission, hereinafter "the Commission", and the Hamilton Bank, hereinafter "the Bank", being Cause No. 82-5432, wherein the Commission is appealing the judgment of the U.S. District Court, Middle Tennessee,

decreeing that 1973 standards must be applied to the Bank's application for plat approval, and,

WHEREAS, the Bank is desirous of obtaining Sketch Plan approval, and particularly is most concerned with having approval of an additional 476 units, which are permissible under the 1973 regulations, but not under later regulations, and,

WHEREAS, the Commission's primary concern in the case is the potentiality of being required to approve a plat with oil and chip roads, permissible under 1973 regulations, but which would place substantial financial burdens on the county for upkeep and maintenance, and,

WHEREAS, these parties are under constraint by the Conference Clerk of the U.S. District Court to resolve these differences, if possible, expressly due to the Case load of that Court, and,

WHEREAS, it appears to all parties that a compromise and settlement of differences in this cause, if approved by the Court, would be beneficial to all these parties, as well as to the existing residents of the Temple Hills area who have a vested interest in the proper completion of this project,

NOW THEREFORE WITNESS: that the Bank in order to obtain approval of a Sketch Plan for the Bank's portion of the Temple Hills Development agrees to the following terms and conditions:

1. Provide open space easement to the County for the additional open space indicated on the Sketch Plan and make provision for maintenance of such before approval of any final plats past (100) units.
2. All new roads shall be built to the following standards: Curbed sections with base to accommodate twenty-four (24) feet of actual driving surface; single shot of oil to seal complete base to stand for a minimum of one (1) year after construction; and two (2) inches of hot mix for final topping to be applied before acceptance of roads by County.
3. Temple Road will be rebuilt to the following standards: Engineer for the Bank and Williamson County Highway Superintendent inspect Temple Road and agree on necessary

work to repair existing road. Highway Commission and the Bank will agree on work to be performed by each and the Bank will pay for all materials at a predetermined unit price. The repair work will be accomplished during the construction period of 1983. The Bank agrees to resurface Temple Road contained in the Temple Hills Development with two (2) inches of hot mix after eighty (80%) of the developer's land is developed or five (5) years after the first final plat on the new development of Temple Hills is approved, whichever is first.

4. The emergency road indicated at the end of Canterbury Lane in the Sketch Plan looping back to Canterbury Lane next to the cemetery shall be a public road built to the standards of the other roads provided concurrence for such can be obtained from the golf course.
5. Before construction of the road serving lots 29C, 30C, 31C, and 32C a detailed geologic and engineering study shall be performed and the design approved. Close supervision by a geologist/engineer shall be made during construction to insure proper construction of this road on unstable soils as indicated.
6. The commercial area indicated on the Sketch Plan will be a traditional retail curb market with gas service only as noted on the Plan approved February 24, 1983.
7. If there are problems with drainage on indicated lots, the units can be relocated provided they are not placed on unstable soils, the 1973 Zoning provisions are not violated and the basic design is not violated.
8. The parties to this agreement recognize that the Commission does not have the authority to withhold plat approval in order to review architectural plans of proposed cluster units. Nonetheless, in a spirit of good faith the Bank agrees to the establishment of an architectural review committee of existing homeowners that shall be provided with design specifications before the cluster units are built. This committee shall have the right to review all specifications and communicate any comments to the developer. The developer shall make all final decisions on ar-

chitectural design, and nothing in this agreement shall be construed to diminish or defeat the right, or to create any rights other than the right of review in the committee.

FURTHER WITNESS that the Commission agrees to the following terms and conditions:

1. Approve a maximum of 476 units on the property now owned by The Bank. This means that there are no areas considered as steep slopes in calculating the density for the Temple Hills Development.
2. Grant variances of the 1973 subdivision regulations for permanent cul-de-sacs and road grades as indicated on the Sketch Plan approved February 24, 1983.
3. The Commission agrees to apply 1973 regulations in all other respects except as changed by this agreement or by other provisions as noted on the plat.

Witness our hands this 10th day of March, 1983.

/s/ CAROLYN E. WATERS

Secretary, Williamson County

Regional Planning Commission

The Hamilton Bank of Johnson City

By:

/s/ RALPH M. KILLEBREW

Executive Vice-President of

Ancorp Corporation

STATE OF TENNESSEE

COUNTY OF WILLIAMSON

Personally appeared before me, /s/ James D. Petersen a Notary Public in aforesaid county and state, the within named CAROLYN WATERS, who made oath that she is the duly elected Secretary of the Williamson County Regional Planning Commission, and that she executed the above document, after being duly authorized to do so by vote of the Williamson County Regional Planning Commission at its regular meeting on February 24, 1983.

/s/ James D. Petersen

NOTARY PUBLIC

My Commission expires:

7-10-85

STATE OF TENNESSEE

COUNTY OF WILLIAMSON

Personally appeared before me, /s/ James D. Peterson, a Notary Public in and for the above said county and state, the witness named RALPH M. KILLEBREW who made oath that he is the Executive Vice President of Ancorp, Inc., a holding company of the HAMILTON BANK OF JOHNSON CITY and that in that capacity he is duly authorized to execute this document for the purpose therein contained.

/s/ James D. Petersen

NOTARY PUBLIC

My Commission expires:

7-10-85